

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

**UNITED STATES OF AMERICA**

Petitioner,

V.

MICROSOFT CORPORATION,

## Respondent.

No. 2:14-mc-00117-RSM

**REPLY IN SUPPORT OF  
MICROSOFT'S MOTION FOR A  
STATUS CONFERENCE**

**NOTE ON MOTION CALENDAR:  
December 26, 2014**

## I. INTRODUCTION

On December 11, 2014, the United States petitioned this Court to enforce an IRS summons against Microsoft. By December 24, petitioner had filed at least 11 additional actions seeking to enforce "related" summonses against Microsoft, against current and former Microsoft executives, and against a Microsoft consultant. More such actions appear to be imminent. This fusillade reinforces the appropriateness of a status conference at which the Court can consider case consolidation and a briefing schedule, among other preliminary matters.

## II. STATEMENT OF FACTS

Petitioner's Opposition does not challenge the facts set forth in the Declaration of Michael J. Bernard in Support of Microsoft's Motion for a Status Conference (Dkt. 7). To the

**REPLY BRIEF IN SUPPORT OF  
MICROSOFT'S MOTION FOR A  
STATUS CONFERENCE-1**

Case No. 2:14-mc-00117-RSM

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1 contrary, petitioner confirms Mr. Bernard's statement about the issuance of numerous  
 2 "related" summonses, which petitioner previously failed to disclose to the Court. *Compare*  
 3 Bernard Decl., ¶ 3, *with* Opposition at 2-3. Petitioner admits that the IRS's purpose in issuing  
 4 this barrage of summonses with unreasonable and inflexible deadlines, followed shortly  
 5 thereafter by enforcement actions, was aimed at unilaterally suspending the statute of  
 6 limitations. *Compare* Bernard Decl., ¶¶ 12-13, *with* Opposition at 6-7. Petitioner implicitly  
 7 admits that Microsoft has cooperated throughout the IRS's seven-year-long audit. *Compare*  
 8 Bernard Decl., ¶ 4, *with* Opposition at 7 ("Whether Microsoft has been cooperative in the past  
 9 or will be cooperative in the future is irrelevant . . . ."). Petitioner ignores Mr. Bernard's  
 10 testimony about the IRS's own conduct, evidently hoping that this, too, "is irrelevant."  
 11

### 12 III. ARGUMENT

13 Petitioner asserts that a status conference is "not warranted at this time" (Opposition  
 14 at 7). Petitioner's Opposition, however, reinforces why a status conference would serve the  
 15 interest of judicial economy.

17 Petitioner argues that granting a status conference would be inconsistent with the  
 18 summary nature of a summons enforcement proceeding under *United States v. Powell*, 379  
 19 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). This argument rests on the mistaken premise  
 20 that the status conference would be a substitute for a show-cause hearing. Furthermore, the  
 21 argument assumes, erroneously, that the IRS has already carried its burden under *Powell* to  
 22 make a *prima facie* showing that supports the issuance of a show-cause order.  
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**REPLY BRIEF IN SUPPORT OF**  
**MICROSOFT'S MOTION FOR A**  
**STATUS CONFERENCE-2**  
 Case No. 2:14-mc-00117-RSM

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1 Microsoft requested the status conference so that the Court could address several  
 2 procedural issues in order to *streamline* any show-cause hearing, *not replace it*. Such a  
 3 conference would assist the Court in:

- 4     • addressing whether the IRS is entitled to a show-cause hearing, given that the  
     5 Petition and supporting declaration fail to allege specific facts showing the IRS's  
     6 satisfaction of the pre-issuance review requirement under 26 U.S.C. §  
     7 6503(j)(2)(a)(i), a statutory condition precedent to the issuance of a valid  
     8 designated summons. *See Motion at 2 n.2.*
- 9     • clarifying the potential scope of the proceeding, given that the IRS has issued  
 10 eighteen "related" summonses;
- 11     • establishing a briefing schedule, given that Microsoft will be asserting affirmative  
 12 and other defenses to the summonses' enforcement; and
- 13     • discussing whether an evidentiary hearing under *United States v. Clarke*, \_ U.S. \_,  
 14 134 S. Ct. 2361 (2014), is appropriate and, if so, when that hearing should be held.

17 As the Supreme Court recognized in *Powell* and *Clarke*, the summoned party is  
 18 entitled to argument, if not also an evidentiary hearing, to enable a court, if appropriate, to  
 19 decline to enforce the summons on the basis that the summons was issued in bad faith or for  
 20 an improper purpose or that its enforcement would be an abuse of the court's process.  
 21

22 Now that petitioner has filed nine other show-cause petitions in the Western District of  
 23 Washington, as well as two other show-cause petitions in California,<sup>1</sup> this Court is faced with  
 24 the urgent question of how best to deal with all these related actions. Microsoft believes that  
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26 <sup>1</sup> The United States has yet to file petitions to enforce six other "related" summonses issued in

1 all of them should be consolidated with this case, in this Court. Petitioner suggests that the  
2 other Western District petitions should be consolidated for consideration separate from the  
3 alleged "designated" summons at issue here (Opposition at 3 n.2) and from the "related"  
4 summons issued to Microsoft's consultant, but this makes no sense:

- 5     • All of the other summonses (including two directed to Microsoft itself) are  
6         admittedly "related" to the "designated" summons in this case.
- 7     • The IRS served Microsoft with notice under 26 U.S.C. § 7609(a) with respect to  
8         each of the other summonses, and Microsoft is entitled to intervene as of right in  
9         those summons enforcement proceedings.
- 10     • Many if not all affirmative defenses apply to all of the summonses.

11 Judicial economy and efficiency will plainly be served if one judge can rule on these many  
12 summonses. Accordingly, Microsoft intends to file a motion to consolidate the related  
13 Western District enforcement proceedings with the instant case. Microsoft further intends to  
14 file motions in the related enforcement proceedings pending in other districts to change venue  
15 to the Western District or to stay these proceedings pending the outcome of the instant case.

16     Another procedural issue for discussion at a status conference is the setting of an  
17 appropriate briefing schedule, should a show-cause order be issued. Petitioner's proposed  
18 show-cause order calls for petitioner to be given a longer response time than normal (namely,  
19 25 days), no doubt in anticipation that Microsoft will be asserting affirmative defenses. It  
20 would be useful for the Court to set reasonable dates for both parties' briefing of the issues.  
21 Those dates depend, in part, on the scope of this proceeding.

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26 this case.

REPLY BRIEF IN SUPPORT OF  
MICROSOFT'S MOTION FOR A  
STATUS CONFERENCE-4  
Case No. 2:14-mc-00117-RSM

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1 A final procedural issue for discussion at a status conference is how *Clarke* applies  
 2 here. In that case, the Supreme Court ruled that an evidentiary hearing is appropriate if the  
 3 facts or circumstances "plausibly rais[e] an inference of bad faith." 134 S.Ct. at 2367. *Clarke*  
 4 provides no guidance on when, during an enforcement proceeding, this determination should  
 5 be made. In the present case, the Court may prefer to decide whether Microsoft has met the  
 6 standard for an evidentiary hearing either before or after any show-cause hearing. Microsoft  
 7 respectfully submits that the interests of judicial economy and efficiency will best be served  
 8 by a decision on an evidentiary hearing *before* any show-cause hearing takes place, so that  
 9 witnesses can testify as part of the show-cause hearing if an evidentiary hearing is warranted.  
 10

11 Apart from *United States v. Derr*, 968 F.2d 943 (9th Cir. 1992), which predated the  
 12 pre-issuance review requirement under 26 U.S.C. § 6503(j)(2)(a)(i), no court has been asked  
 13 to rule on the enforceability of a designated summons. *Derr* held that a taxpayer's  
 14 cooperation in producing information during an audit is not an absolute defense to  
 15 enforcement of a designated summons, and that the *Powell* standard applies to a designated  
 16 summons. See *id.* at 945-46. Microsoft is not seeking to re-litigate *Derr*. Rather, Microsoft  
 17 believes that, under *Powell* and *Clarke*, the allegedly "designated" summons and the "related"  
 18 summonses should not be enforced. Contrary to petitioner's assertion that a status conference  
 19 would somehow undermine the *Powell* standard, Microsoft submits that a status conference  
 20 would assist the Court in applying the *Powell* standard in a show-cause hearing to the specific  
 21 facts and circumstances in this case.  
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**REPLY BRIEF IN SUPPORT OF**  
**MICROSOFT'S MOTION FOR A**  
**STATUS CONFERENCE-5**

Case No. 2:14-mc-00117-RSM

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2                          IV. CONCLUSION  
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4 Microsoft respectfully requests that its motion be granted and that the Court issue an  
order scheduling a status conference before any show-cause order is issued.  
5

6 Respectfully submitted this 26th day of December, 2014.  
7

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9

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REPLY BRIEF IN SUPPORT OF  
MICROSOFT'S MOTION FOR A  
STATUS CONFERENCE- 6  
Case No. 2:14-mc-00117-RSM

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STATUS CONFERENCE- 6  
Case No. 2:14-mc-00117-RSM

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1                   **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury that on December 26, 2014, I electronically filed the  
3 foregoing with the Clerk of the Court using the CM/ECF system, which will send notification  
4 of such filing to all parties.

5  
6                   s/ Robert B. Mitchell \_\_\_\_\_  
7                   Robert B. Mitchell  
8                   K&L GATES LLP  
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REPLY BRIEF IN SUPPORT OF  
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STATUS CONFERENCE-7  
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